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## The Landlord's Hypothec in Comparative Perspective

Andrew J.M. Steven<sup>1</sup>

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### A. Introduction

But the hypothec of the landlord in Scotland appears to be of a nature exceedingly strong and very peculiar, arising from the former state of that country, and from the fact of the landlords having made the laws, and not the tenants, and still less the traders, who, probably, had no existence at the origin of the law.<sup>2</sup>

So said Lord Brougham and Vaux, in one of his first cases as Lord Chancellor, decided in 1830. Although he had spent most of his professional life until then as a barrister, he was admitted in 1800 to the Faculty of Advocates in Edinburgh. Therefore, unlike many of his fellow judges in the House of Lords in the nineteenth century, he had some knowledge of Scots law from which to speak.<sup>3</sup> The particular focus of the instant case was the real effect of the hypothec and its persistence notwithstanding the removal of the goods in question from the leased premises. In that respect the Scottish hypothec is more powerful than its English equivalent of distress for rent<sup>4</sup> and might therefore be regarded as 'exceedingly strong'. But the remedy is hardly 'very peculiar'. Many legal systems recognise a similar right and therefore give the landlord a priority over the tenant's<sup>5</sup> other creditors in respect of unpaid rent.

This article examines the historical basis of the hypothec and its English common law equivalent. It then considers its survival or otherwise in the modern law in a number of systems. Constraints of space mean that it is not possible to examine many of the specific aspects of the remedy such as the amount of rent secured. The third part of the article,

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<sup>2</sup> *McTavish v Scott* (1830) 4 W & S 410 at 414-415 *per* Lord Brougham LC.

<sup>3</sup> See generally the polemical A Dewar Gibb, *Law from over the Border* (1950) chapters 3 and 4. Of this Lord Chancellor, he writes at 64: 'The talkative Brougham who could on occasion say severe things of Scots lawyers was on the whole inclined to stand up for them.'

<sup>4</sup> In England the landlord is limited to a thirty day period to pursue goods where the tenant has fraudulently or clandestinely removed the goods to avoid the distress. See Distress for Rent Act 1737 s 1.

<sup>5</sup> The Scottish and English terminology of 'landlord' and 'tenant' will be used predominantly here. Other systems, for example, South Africa and Louisiana normally use 'lessor' and 'lessee'.

however, looks at what is perhaps the remedy's most curious feature: its ability to affect goods which do not belong to the tenant. This is critically evaluated. Finally, the wider question of whether the landlord should be entitled to a special right in relation to rent recovery is considered.

## B. Historical Background

### 1. Civil law

The landlord's hypothec (*hypotheca*) developed as a non-possessory form of pledge (*pignus*).<sup>6</sup> A tenant would agree in the case of agricultural land that the crops were pledged for the rent. For houses, there could be a similar arrangement as regards the goods brought in by the tenant (*invecta et illata*). The strict effect of these agreements was that if the rent was not paid, the landlord would be entitled to take possession of the property. Towards the end of the Republic, the Praetor Salvius gave the landlord the *interdictum Salvianum* to enforce this. Subsequently, the landlord was granted an *actio in rem*, the *actio Serviana*. The later Roman law freely admitted the conventional hypothec. It also recognised a significant number of tacit hypothecs, including that of the landlord. Here is Pomponius: 'In praediis rusticis fructus qui ibi nascuntur tacite intelleguntur pignori esse dominio fundi locati, etiamsi nominatim id non conuenerit. Uidendum est, ne non omnia illata uel inducta, sed ea sola, quae, ut ibi sint, illata fuerint, pignori sint: quod magis est.'<sup>7</sup> This area of Roman law, however, was incoherent. The ranking rules as between the various tacit hypothecs, not to mention conventional hypothecs were unclear. Frankly, there were too many tacit hypothecs.<sup>8</sup>

From the fall of the Roman Empire through to the Middle Ages, specific law on the remedies of landlord in Europe has been said to have been insubstantial.<sup>9</sup> The reason for this was the apparent lack of leases, land instead being usually worked by the slaves of its owner, rather than tenants. But in later times the Roman law was naturally influential in the *ius commune* and the codifications of Western European countries. The landlord's hypothec was one of a number of tacit hypothecs recognised by Grotius in the early seventeenth century and Voet at the turn of the eighteenth century in Dutch law.<sup>10</sup> Similarly, Pothier writes of French law in 1763: 'Our Customs, in imitation of the Roman law, have granted to lessors of properties a species of right of pledge upon fruits and moveables'.<sup>11</sup> The Austrian Civil Code of 1811 recognises this right of the landlord,<sup>12</sup> as does the German Pandektist, Windscheid, writing later in the nineteenth century.<sup>13</sup>

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<sup>6</sup> See generally R Pothier, *Treatise on the Contract of Letting and Hiring* (1763, trans G A Mulligan, 1953) 89-90; J A C Thomas, *Textbook of Roman Law* (1976) 332-334; W W Buckland, *A Textbook of Roman Law from Augustus to Justinian* (1921) 472-474; A J M Steven, 'Rights in Security over Moveables' in K Reid and R Zimmermann (eds), *A History of Private Law in Scotland* (2000), vol 1, 333 at 345-346.

<sup>7</sup> D 20.2.7. (As regards rural land the crops are impliedly taken to be hypothecated to the owner of the land, even if not agreed in so many words. We must see whether everything brought on to premises is hypothecated or only what is brought on so as to remain there. The latter is the better view): translation by Watson et al, 1985).

<sup>8</sup> B Nicholas, *An Introduction to Roman Law* (1962) 152-153.

<sup>9</sup> R Hunter, *Landlord and Tenant* (4<sup>th</sup> edn, by W Guthrie, 1876) vol 2, 356.

<sup>10</sup> Grotius, *Inleidinge tot de Hollandsche rechtsgeleertheid* (1631) 2.48.17; Voet, *Commentarius ad Pandectas*, (1698-1704) 20.2.

<sup>11</sup> R Pothier, *Contrat de Louage* (1763, trans G A Mulligan, 1953) § 228.

<sup>12</sup> § 1101 ABGB.

<sup>13</sup> B Windscheid, *Lehrbuch des Pandektenrechts* (9<sup>th</sup> edn by T Kipp, 1906) § 1159.

## 2. Common law

The English equivalent of the landlord's hypothec – distress for rent – apparently originated in the Anglo-Saxon self-help remedies of the ninth century.<sup>14</sup> The earliest instances recorded of it being referred to expressly are somewhat later during the reign of King Canute.<sup>15</sup> Distress has been described judicially as 'an archaic remedy'<sup>16</sup> and has been said to be feudal.<sup>17</sup> The law originally required the landlord to make a number of court appearances before he could use it.<sup>18</sup> There were restrictions on the goods which could be distrained, for example, animals and equipment necessary for running a farm were only eligible if there was a lack of other goods.<sup>19</sup> Most importantly, the goods could not be sold. The landlord merely had the right to retain possession of them as a compulsitor for the tenant to pay, rather like the modern possessory lien.<sup>20</sup>

Was there any Roman law influence behind distress? It is very likely that there was. Lord Chief Baron Gilbert, in his eighteenth century work *Law and Practice of Distresses and Replevin* wrote of forfeiture of land under feudal law and then stated:

The rigour of this law was mitigated with us, and these feudal forfeitures changed into distresses, according to the pignorary method of the civil law; from whence the notion seems to have been first borrowed; as may be seen in the title, *de districtione pignorum* – *Creditoris arbitrio permittitur, ex pignoribus sibi obligatis quibus velit districtis, ad suum commodum pervenire*. For there appear no footsteps of it in the feudal authors.<sup>21</sup>

In his early twentieth century work on the subject, Enever believed that distress was based on the same principles as the Roman law remedy of *pignoris capio*.<sup>22</sup> Neither Gilbert nor Enever make express reference, however, to the landlord's hypothec.

In contrast, the Scottish institutional writer Bankton equated distress with hypothec: 'There is, by the law of England, in the same manner as with us, a tacit pledge (we call it an Hypothec) granted to a landlord . . . whereby he may distrain for the [rent].'<sup>23</sup> The similarity between distress and the Roman law remedy has been recognised by more modern writers. Borkowski and du Plessis, in relation to the latter state: 'Hypothec probably developed from the practice whereby tenants agreed that the landlord could distrain on goods or crops if the rent was unpaid.'<sup>24</sup>

<sup>14</sup> I Loveland, 'Distress for Rent: An Archaic Remedy?' (1990) 3 *JLS* 363 at 365.

<sup>15</sup> Ibid at 370, citing F Enever, *History of the Law of Distress for Rent and Damage Feasant* (1931) 22.

<sup>16</sup> *Abingdon Rural District Council v O'Gorman* [1968] 2 QB 811 at 819 per Lord Denning.

<sup>17</sup> See, for example, Sir Jack Jacob, *The Fabric of English Civil Justice* (1987) 179.

<sup>18</sup> Loveland, 'Distress for Rent: An Archaic Remedy?' at 370.

<sup>19</sup> Enever, *History of the Law of Distress for Rent and Damage Feasant* 68-77.

<sup>20</sup> See, for example, G J Bell, *Commentaries on the Law of Scotland* (7<sup>th</sup> edn, 1870) II, 91.

<sup>21</sup> Sir Geoffrey Gilbert, *Law and Practice of Distresses and Replevin* (3<sup>rd</sup> edn, 1794) 2. 'Replevin' is the remedy for obtaining return of the goods where the landlord is alleged to have acted illegally. Security must be provided pending the ultimate outcome of the case. See D Rook, *Distress for Rent* (1999) 59-61.

<sup>22</sup> Enever, *History of the Law of Distress for Rent and Damage Feasant* 2 and 11. On *pignoris capio*, see Buckland, *A Textbook on Roman Law* 618-621.

<sup>23</sup> Andrew McDouall, Lord Bankton, *An Institute of the Laws of Scotland in Civil Rights: With Observations upon the Agreement or Diversity between them and the Laws of England* (1751) reprinted Stair Society, vol 41 (1993), 'Observations on the Law of England' I.17.4.

<sup>24</sup> A Borkowski and P du Plessis, *Textbook on Roman Law* (3<sup>rd</sup> edn, 2005) 304.

There were two prominent features of the later development of distress. First, the requirement for court involvement was eased. Distress effectively became a self help remedy.<sup>25</sup> Secondly, a statute was passed in 1689 permitting the landlord to sell the distrained goods if the tenant did not make good the rent arrears.<sup>26</sup> The remedy thus became more like its civilian security counterpart.<sup>27</sup>

### 3. Mixed jurisdictions

It is well understood that the mix in mixed jurisdictions is not an even one.<sup>28</sup> In the area of property law, the civilian rules have for the most part prevailed. Certainly, this is true for the four systems which will be mentioned here, namely Louisiana, Quebec, Scotland and South Africa.<sup>29</sup> All of these have been heavily influenced by the landlord's hypothec of Roman law.

Palmer writes that in Louisiana the lessor's privilege in respect of the rent, which was added to the Civil Code in the 1825 revision, 'originated in Roman law'.<sup>30</sup> He notes that the Roman hypothec covered the fruits in relation to rural subjects, but that French law extended this to cover all moveables on the premises. His source is Pothier.<sup>31</sup> In Quebec, the Civil Code of Lower Canada of 1866 gave the lessor a similar privilege to that in Louisiana.<sup>32</sup> This was hardly surprising, given the French influence, as was the fact that the law was on many points similar or identical to the French Civil Code.<sup>33</sup> In South Africa, the lessor's hypothec clearly originated in the Roman law, as developed by Roman Dutch law.<sup>34</sup>

In Scotland the picture is perhaps a little more complex, in that the initial remedy of the landlord in medieval times was actually distress.<sup>35</sup> As Hunter notes, the brieve of distress was originally introduced for superiors to recover sums due by vassals, but soon became used by landlords against tenants.<sup>36</sup> A brieve was a document in which a person required another

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<sup>25</sup> Loveland, 'Distress for Rent: An Archaic Remedy?' at 371.

<sup>26</sup> Distress Act 1689 s 1. It begins: 'Whereas the most ordinary and ready way for Recovery of Arrears of Rent is by Distresse yet such Distresses not being to be sold but onely detained as Pledges for inforcing the payment of such Rent the persons distraining have litle benefit thereby . . .' Once again note the use of the term 'pledge'.

<sup>27</sup> Its use and the angst of a tenant farmer and his large family unable to pay the rent because of the falling price of farm were famously portrayed by Sir David Willkie in his 1815 painting 'Distraining for Rent'. See <http://www.nationalgalleries.org/index.php/collection/highlights/4:582/results/20/5588/>

<sup>28</sup> See, for example, N R Whitty, 'The Civilian Tradition and Debate on Scots Law' 1996 *Tydskrif vir die Suid-Afrikaanse Reg* 227 and 442; H L MacQueen, 'Mixture or Muddle' 1997 *Zeitschrift für Europäisches Privatrecht* 369; and J du Plessis, 'The promises and pitfalls of mixed legal systems: the South African and Scottish experiences' (1998) 3 *Stellenbosch Law Review* 338.

<sup>29</sup> For Louisiana, see A N Yiannopoulos, *Louisiana Civil Law Treatise, Volume 2: Property* (4<sup>th</sup> edn, 2001) § 5. For Quebec, see S Normand, *Introduction au droit des biens* (2000) 7-9. For Scotland and South Africa, see K Reid and C G van der Merwe, 'Property Law: Some Themes and Some Variations' in R Zimmermann, D Visser and K Reid (eds), *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (2004) 637 at 641-642.

<sup>30</sup> V V Palmer, *The Civil Law of Lease in Louisiana* (5<sup>th</sup> edn, 1997) § 6-1.

<sup>31</sup> Pothier, *Contrat de Louage* § 228.

<sup>32</sup> Civil Code of Lower Canada, arts 1637-1640.

<sup>33</sup> P-G Jobin, *Le Louage* (2<sup>nd</sup> edn, 1996) 3.

<sup>34</sup> See W E Cooper, *Landlord and Tenant* (2<sup>nd</sup> edn, 1994) 179-180. Note, however, the erroneous argument of the respondent in *Blomfontein Municipality v Jacksons Ltd* 1929 AD 266 at 268: 'The landlord's hypothec was not known to the Roman law. It developed in Roman-Dutch law in the sixteenth and seventeenth centuries'. Rather, what seems to have developed then is the third party effect.

<sup>35</sup> The following part of the paper is based on Steven, 'Rights in Security over Moveables' at 347.

<sup>36</sup> Hunter, *Landlord and Tenant* 358.



person to do something.<sup>37</sup> According to MacQueen, the earliest recorded evidence of a brief of distress dates to 1302.<sup>38</sup> He adds, however, that Kames, Ross and Erskine were of the view that this type of brief had been introduced by Alexander II (1198-1249).<sup>39</sup> In his *Practicks*, Balfour refers to a number of distress cases, notably the 1537 decision of *Wauchop v Borthwick*.<sup>40</sup> There it was held that the proprietor 'of ony landis, may point and distreinzie his tenentis, occupayaris thair of, thair gudis and geir . . . for the last three termis maillis bypass auchtand to him of the saidids landis'.<sup>41</sup> As can be seen, civilian terminology is not used.

With the Reception of Roman law, things were to change.<sup>42</sup> Early in the seventeenth century, the civil law influence reached Scotland, presumably from France or Holland or both.<sup>43</sup> In the 1611 decision of *Wardlaw v Mitchell*<sup>44</sup> reference was made to the 'privilege' of a landlord. The term 'hypothecated' appeared for the first time in *Hay v Keith*,<sup>45</sup> decided in 1623. In *Lady Dun v Lord Dun*,<sup>46</sup> a year later 'tacite hypothecated' was used. The later seventeenth century saw the landlord's hypothec entirely replacing distress.<sup>47</sup> One cannot be certain as to the relationship between the two remedies. Walter Ross believed that the hypothec developed out of the law of distress.<sup>48</sup> The difficulty with this analysis is that distress was essentially a diligence, in contrast to a real right in security. Hunter's persuasive conclusion is that the hypothec was substituted for its predecessor, but that this was not a difficult process because of the similarity between the two.<sup>49</sup> This is illustrated particularly by the fact that a specific diligence i.e. sequestration for rent is used to enforce the hypothec.

### C. Existence in Modern Law

The landlord's hypothec, or an equivalent remedy, exists in many modern legal systems. Examples are France,<sup>50</sup> Germany,<sup>51</sup> Greece,<sup>52</sup> Italy,<sup>53</sup> Louisiana<sup>54</sup> and South Africa.<sup>55</sup> Elsewhere, however, it has been the subject of either total or partial abolition.

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<sup>37</sup> H L MacQueen, *Common Law and Feudal Society in Medieval Scotland* (1993) 3.

<sup>38</sup> *Ibid* at 125.

<sup>39</sup> *Ibid*, citing Lord Kames, *Historical Law Tracts* (1758) vol 2, 57-63; J Erskine, *An Institute of the Law of Scotland* (8<sup>th</sup> edn, by J Badenoch Nicolson, 1871) II.12.2 and W Ross, *Lectures on the History and Practice of the Law of Scotland relative to Conveyancing and Legal Diligence* (2<sup>nd</sup> edn, 1822) vol 1, 397.

<sup>40</sup> 13 December 1537, reported in P G B McNeill (ed), *The Practicks of Sir James Balfour of Pittendreich*, Stair Society, vol 22 (1963) 398. See also *Mason v Ritchie's Trs* 1918 1 SLT 351 at 375 per Lord President Strathclyde.

<sup>41</sup> 'Maillis' means rent.

<sup>42</sup> See Hunter, *Landlord and Tenant* 359-360.

<sup>43</sup> J Rankine, *The Law of Leases in Scotland* (3<sup>rd</sup> edn, 1916) 366.

<sup>44</sup> (1611) Mor 6187.

<sup>45</sup> (1623) Mor 6188

<sup>46</sup> (1624) Mor 6217.

<sup>47</sup> See, for example, Bankton, *Institute* I.17.8-12.

<sup>48</sup> W Ross, *Lectures on Conveyancing* (2<sup>nd</sup> edn, 1822) vol 2, 406-407.

<sup>49</sup> Hunter, *Landlord and Tenant* 360.

<sup>50</sup> Art 2332 *Code civil*.

<sup>51</sup> § 562 *BGB*.

<sup>52</sup> Art 604 *Greek Civil Code*.

<sup>53</sup> Art 2764 *Codice civil*.

<sup>54</sup> Arts 2707-2710 *Louisiana Civil Code*.

<sup>55</sup> Cooper, *Landlord and Tenant* 179-200; A J Kerr, *The Law of Sale and Lease* (3<sup>rd</sup> edn, 2004) 389-405; P J Badenhorst, J M Pienaar and H Mostert, *Silberberg and Schoeman's The Law of Property* (5<sup>th</sup> edn, 2006) 404-407 and 436-439.

## 1. Total abolition

Dutch law removed the privilege (*voorrecht*) of the landlord in 1992 upon the introduction of Book 3 of the new Civil Code. Following Roman law, it had extended to the *invecta et illata*, the goods on the premises. These did not have to belong to the tenant.<sup>56</sup> The current year's rent and that in the three preceding years were secured.<sup>57</sup> It was removed because it was not used in practice.<sup>58</sup> In Quebec, the legislature abolished the lessor's privilege in residential leases in 1979. The move was controversial. In the view of the leading text there, it was justified.<sup>59</sup> In practice, where the tenant was unable to pay the rent he was unlikely to have sufficient goods which could be seized under the privilege. Moreover, the ability to seize prior to obtaining a court judgment was open to abuse. The privilege was then abolished as regards all new leases created after 31 December 1993.<sup>60</sup> A transitional procedure allowed landlords of existing leases to preserve the privilege. This required the registration of a notice prior to 31 December 1994. This transformed the privilege into a legal (tacit) hypothec. But the reprieve was temporary. It lasted for 10 years only, or of course less if the lease ended before. Further renewal was not possible.

A significant number of common law jurisdictions have abolished distress for rent. These include Northern Ireland<sup>61</sup> and four Australian states.<sup>62</sup> The end of the remedy in Northern Ireland was prompted by the Payne Committee.<sup>63</sup> It recommended abolition, but only after the introduction of a new Government-funded enforcement agency to facilitate recovery of all judgment debts.<sup>64</sup> This led to the passing of legislation in Northern Ireland,<sup>65</sup> but not in England and Wales. Thus distress was removed in part of the United Kingdom as part of a debt modernisation enforcement process. As we see shortly, changes are now taking place in the rest of the country for the same reason, but nearly forty years later.

## 2. Partial abolition

In a number of jurisdictions, the landlord's remedy has been removed as regards residential leases.<sup>66</sup> The Australian Capital Territory did this shortly after World War II. The same reform was carried out in the Northern Territory, South Australia and British Columbia in Canada in the 1970s. Similarly, in 1992 the Republic of Ireland passed legislation providing that no distress may be levied for rent of any premises let solely as a dwelling.<sup>67</sup>

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<sup>56</sup> Arts 1185 and 1186, *BW* (1838). See W M Kleijn, 'Law of Property' in D C Fokkema, J M J Chorus, E H Hondius and E Ch Lissers, *Introduction to Dutch Law for Foreign Lawyers* (1978) 73 at 109.

<sup>57</sup> Art 1189 *BW* (1838).

<sup>58</sup> I owe this information to Dr Michael Milo of Utrecht University.

<sup>59</sup> Jobin, *Le Louage* 16-17.

<sup>60</sup> Ibid at 149; Arts 134-157 *Loi d'application*; P Ciotola, *Droit des sûretés* (3<sup>rd</sup> edn, 1999) 337; F L Carsley, 'Commercial Leasing under the New Civil Code of Quebec' (September 1998), available at <http://www.dgclex.com/documents/publications/Art-FC-Commercial%20Leasing.pdf>

<sup>61</sup> The Judgments Enforcement (Northern Ireland) Order 1981 (No 226) (NI 6) Article 143, made under the Northern Ireland Act 1974, s 1(3), Sch 1, para 1.

<sup>62</sup> New South Wales, Queensland, Victoria and Western Australia. See Law Commission, *Landlord and Tenant: Distress for Rent* (Law Com No 194, 1991) para 3.30.

<sup>63</sup> Report of the Committee on the Enforcement of Judgment Debts (1969, Cmnd 3909).

<sup>64</sup> Loveland, 'Distress for Rent: An Archaic Remedy?' at 379 note 12.

<sup>65</sup> Judgments (Enforcement) Act (NI) 1969.

<sup>66</sup> See Law Commission, *Landlord and Tenant: Distress for Rent* para 3.30.

<sup>67</sup> Housing (Miscellaneous Provisions) Act 1992 s 19. See J C Wylie, *Landlord and Tenant Law* (2<sup>nd</sup> edn, 1998) para 12-14.

In Scotland, the landlord's hypothec was abolished as regards agricultural leases exceeding two acres by the badly named Hypothec Abolition (Scotland) Act 1880.<sup>68</sup> According to Rankine, this was a 'result of long-continued agitation' in favour of the tenant's other creditors.<sup>69</sup> The Scottish Executive published a consultation paper on the enforcement of civil obligations in 2002, which canvassed the abolition of sequestration for rent, the diligence used to enforce the hypothec. The paper commented: 'The case law on the subject suggests that it is rarely used and only in commercial situations.'<sup>70</sup> It continued: 'It is questionable whether this form of diligence remains relevant within a modern enforcement system, particularly insofar as it may remain competent in relation to residential property'.<sup>71</sup> This paper was inadequate, as it did not differentiate properly between the security that is the hypothec and the enforcement mechanism of sequestration for rent.<sup>72</sup> It was also questionable to infer a lack of usage from a lack of case law. As regards residential leases, however, the remedy was probably seldom used due to the significant number of statutorily exempt goods and the wide powers of sheriff to delay or suspend enforcement in private sector lets.<sup>73</sup>

There were thirty responses to the consultation.<sup>74</sup> Fifteen favoured abolition of sequestration for rent. The other fifteen did not. Those of the latter viewpoint, particularly some local authorities, believed that it was 'a useful and important remedy' especially against commercial tenants.<sup>75</sup> In 2004 the Scottish Executive took the next step by publishing its *Modernising Bankruptcy and Diligence in Scotland: Draft Bill and Consultation*. This proposed the abolition of sequestration for rent and the restriction of the hypothec to leases which are neither residential nor agricultural.<sup>76</sup> In essence, the remedy will be used for commercial properties only.<sup>77</sup> This position seems only to be justified by the fact that this is what happens in current practice. These proposals were given effect to the Bankruptcy and Diligence etc (Scotland) Bill, which was introduced into the Scottish Parliament in 2005. Again, the Executive's rationale was not an entirely convincing. It described sequestration for rent as an 'old and ineffective diligence'.<sup>78</sup> This is a view not shared by others.<sup>79</sup> There were a number of other difficulties with the original version of the Bill.<sup>80</sup> For example, it referred to the hypothec being 'created' when it arises by operation of law. The Bill was duly amended and eventually passed, becoming the Bankruptcy and Diligence etc (Scotland) Act 2007.<sup>81</sup>

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<sup>68</sup> Hypothec Abolition (Scotland) Act 1880 s 1.

<sup>69</sup> Rankine, *Leases* 371.

<sup>70</sup> Scottish Executive, *Enforcement of Civil Obligations in Scotland: A Consultation Document* (2002) para 5.304.

<sup>71</sup> *Ibid* at para 5.305.

<sup>72</sup> See A J M Steven, 'Goodbye to the Landlord's Hypothec?' 2002 *SLT (News)* 177 and A McAllister, *Scottish Law of Leases* (3<sup>rd</sup> edn, 2002) paras 5.77-5.79.

<sup>73</sup> McAllister, *Scottish Law of Leases* para 5.42.

<sup>74</sup> Scottish Executive, *Enforcement of Civil Obligations in Scotland: Analysis of Consultation Responses* (2002) paras 5.50-5.53.

<sup>75</sup> *Ibid* at para 5.52.

<sup>76</sup> Scottish Executive, *Modernising Bankruptcy and Diligence in Scotland: Draft Bill and Consultation* (2004) paras 10.66-10.74.

<sup>77</sup> It will remain competent for mineral leases and game leases too. See Scottish Executive, Bankruptcy and Diligence etc (Scotland) Bill Policy Memorandum (2005) para 1007. But this may be doubted as regards game where the tenant has a right over land occupied by others. See Rankine, *Leases* 371.

<sup>78</sup> Bankruptcy and Diligence etc (Scotland) Bill Policy Memorandum para 992.

<sup>79</sup> McAllister, *Scottish Law of Leases* para 5.76; A solicitor MSP, Murdo Fraser, commented that it 'was always a useful sledgehammer for a lawyer who was helping a landlord to recover funds from a recalcitrant tenant': Scottish Parliament, Enterprise and Culture Committee, Official Report, 6 December 2005, col 2562.

<sup>80</sup> See A J M Steven, 'Goodbye to Sequestration for Rent' 2006 *SLT (News)* 17.

<sup>81</sup> The relevant provision is s 208.



When this comes into force, the hypothec will have a considerably narrower scope than before. But it will remain for commercial leases.

There have been similar developments south of the border. The Law Commission in a Working Paper issued in 1986 and a Report in 1991 recommended the wholesale abolition of distress for rent.<sup>82</sup> It did this for various reasons, notably its extra judicial nature, the priority given to landlords over other creditors and the harshness to the tenant.<sup>83</sup> Consideration was given to retaining it for commercial and public sector residential leases, but this was rejected primarily on the ground that landlords in these cases no more deserved a priority over other creditors than other landlords.<sup>84</sup> In 2001 the Lord Chancellor's Department published its own consultation paper on distress.<sup>85</sup> It agreed that there should be abolition, but that for commercial leases it should be replaced with a modified procedure removing the worst features of the common law, such as the power of the landlord to distrain personally and his or her right to sell the goods almost immediately.

Like in Scotland, the justification primarily is the current use of the remedy in practice. The proposal will be given effect by the Tribunals, Courts and Enforcement Act 2007.<sup>86</sup> It will introduce a new procedure to be known as CRAR (commercial rent arrears recovery).<sup>87</sup> Whereas the scheme of the new legislation in Scotland is to abolish the hypothec as regards various types of lease so that in effect only commercial leases are left, the English legislation takes the opposite approach by defining a lease of 'commercial premises'.<sup>88</sup> Unlike in Scotland, agricultural leases are included.<sup>89</sup> The policy reasons for this difference are not clear.<sup>90</sup>

## D. Third Party Effect

### 1. History

The ability of the landlord's remedy to affect goods belonging to the tenant is surely its most remarkable feature. It conflicts with the fundamental principle of *res aliena pignori dari non potest*.<sup>91</sup> This was the rule in Roman law, where the hypothec was apparently confined to the tenant's goods.<sup>92</sup> Third party effect can only be definitively traced to the customary laws of France and Holland and was certainly established in the latter by the middle of the seventeenth century.<sup>93</sup> Pothier, writing of French law, in the mid eighteenth century has an

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<sup>82</sup> Law Commission, Distress for Rent (Working Paper No 97, 1986); Law Commission, Landlord and Tenant: Distress for Rent (Law Com No 194, 1991).

<sup>83</sup> Landlord and Tenant: Distress for Rent para 3.2.

<sup>84</sup> Ibid at para 3.21-3.28.

<sup>85</sup> Lord Chancellor's Department, *Enforcement Review Consultation Paper 5: Distress for Rent* (2001) chapters 2 and 3.

<sup>86</sup> Tribunals, Courts and Enforcement Act 2007 ss 71-87.

<sup>87</sup> 2007 Act s 72(2).

<sup>88</sup> 2007 Act s 75.

<sup>89</sup> 2007 Act s 80.

<sup>90</sup> The background in Scotland is the abolition of the hypothec for most agricultural leases in 1880. See above.

<sup>91</sup> C 18.16.6 (Another person's goods cannot be given in pledge). See Pothier, *Contrat de Louage* § 241; *Jaffrey v Carrick* (1836) 15 S 43 at 45 and the Fourteenth Report of the Law Reform Committee for Scotland (1964) para 5.

<sup>92</sup> *Goldinger's Trustee v Whitelaw & Sons* 1916 TPD 230 at 235 per Mason J.

<sup>93</sup> See Pothier, *Contrat de Louage* § 240; Voet, *Commentarius ad Pandectas* 20.2.5; *Bourne and Co v Lindsay* 1912 TPD 142 at 144 per Wessels J.

extended treatment of it.<sup>94</sup> It is around the same time that there is the first definitive statement of the operation of such a rule in Scotland. Bankton writes: 'It is only the tenant's own goods, as *invecta et illata* into the house, that are hypothecated, or such of other mens [sic] as are used for furniture to the same'.<sup>95</sup> Likewise, the eighteenth century sees Blackstone writing in England: 'we may lay it down as a general rule, that all chattels personal are liable to be distrained, unless particularly protected or exempted'.<sup>96</sup> As shall be seen below, the rule has prevailed in a number of systems in modern times.

## 2. Rationale

The reasons given to justify third party effect are now considered.

### a. *Implied consent*

The principal justification is that the third party has consented to the goods being subject to the security. Pothier discusses this at some length, stating: '[A] person who lends or leases movables to my lessee . . . is taken, by allowing my house to be furnished with those movables, to consent to their being bound for the rent, because he knows, or ought to know, that everything in the house is liable for the rent and for all obligations of the lease.'<sup>97</sup> He gives exceptions to this principle, for example, goods which have been stolen and goods sold and delivered to the tenant in expectation of being paid immediately.<sup>98</sup> Voet is to similar effect<sup>99</sup> and so is Bankton.<sup>100</sup>

Voet writes that the hypothec covers goods 'taken into or on the hired tenement with the consent of owner that they are there permanently or are kept there for the use of the lessee.'<sup>101</sup> Once again there is agreement from his near contemporaries in Scotland and France.<sup>102</sup> Bankton, for example, states that goods left accidentally or animals put to pasture for 'a night or two' are not affected.<sup>103</sup> The rule that only things permanently on the premises are covered does come directly from Roman law.<sup>104</sup> It provides a limitation in relation to all goods, including those of a third party. If they are not intended for perpetual use on the premises then they escape the landlord's remedy.

### b. *Landlord does not know whether the tenant is solvent*

Pothier writes that the Customs of France required third party effect because a landlord 'is, as a general rule, unacquainted with his lessee's financial position. All that he can rely upon is the furniture in the house, and he cannot know whether it belongs to his lessee or not.'<sup>105</sup> A

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<sup>94</sup> Ibid.

<sup>95</sup> Bankton, *Institute* I.17.10.

<sup>96</sup> Sir William Blackstone, *Commentaries on the Laws of England* (1768) III,7. In *Gilman v Elton* (1821) 3 Brod & B 75 at 79, 129 ER 1211 at 1212, Dallas CJ stated: 'the rule grows out of the relation of landlord and tenant, and out of the nature of the thing itself; for all such rules are of simple origin'

<sup>97</sup> Pothier, *Contrat de Louage* § 240.

<sup>98</sup> Ibid § 243 and 244.

<sup>99</sup> Voet, *Commentarius ad Pandectas* 20.2.5. See too *Goldinger's Trustee v Whitelaw & Sons* 1916 TPD 230 at 236 per Mason J.

<sup>100</sup> Bankton, *Institute* I.17.10.

<sup>101</sup> Voet, *Commentarius ad Pandectas* 20.2.5.

<sup>102</sup> Bankton, *Institute* I.17.10; Pothier, *Contrat de Louage* § 245-247.

<sup>103</sup> Ibid.

<sup>104</sup> D 20.2.7.1.

<sup>105</sup> Pothier, *Contrat de Louage* § 241.

similar statement was given by Ashurst J in a 1792 English case.<sup>106</sup> He said that the landlord was providing credit to the tenant in respect of the goods visible on the premises and therefore had the right to distrain any of these goods.

c. *The avoidance of fraud*

The vulnerability of third party goods to distress has been stated to be ‘founded on reasons on public of convenience, and calculated for the prevention of fraud’.<sup>107</sup> Presumably the concern is that the tenant could claim that the goods were not his or hers and therefore could not be distrained. Bankton seems to make a similar point as regards the landlord’s hypothec.<sup>108</sup>

d. *No right to sell distrained goods originally*

Blackburn J suggested that in the early law of distress ‘no harm’ was caused by third party goods being affected.<sup>109</sup> This was because the landlord could not sell the goods and once it was found out that they did not belong to the tenant they would normally be released. As discussed above, the Distress Act 1689 changed the position by conferring a power of sale on landlords.

e. *Personal bar*

After discussing the consent theory, the South African writer Cooper suggests: ‘The better view is that by permitting his property to be on hired premises and by failing to notify the lessor of his ownership, an owner leads the lessor to believe that the property is the lessee’s.’<sup>110</sup> This argument appears to have its basis in personal bar.

Before evaluating these justifications, the modern law in a number of jurisdictions will be set out.

### 3. Modern law

a. *England and Wales, and Ireland*

There have been a number of statutory interventions restricting the applicability of distress to goods belonging to third parties.<sup>111</sup> For example, railway rolling stock which has its ownership clearly indicated is protected. The most important of these is the Law of Distress Amendment Act 1908 which in general confers an absolute privilege from distress in respect of the goods of undertenants, lodgers and other persons with no beneficial interest in the tenancy.<sup>112</sup> There are exceptions to this rule, including the goods of the tenant’s spouse<sup>113</sup> and goods held under hire purchase or other credit agreements.<sup>114</sup> Even for the goods protected by the 1908 Act, the position of the third party is very weak. The legislation requires him to serve a notice in writing on the landlord setting out which goods he owns.<sup>115</sup> There is

<sup>106</sup> *Gorton v Falkner* (1792) 4 Term Reports 565 at 568; 100 ER 1178 at 1180.

<sup>107</sup> Argument of counsel in *Francis v Watt* (1764) 3 Burr 1499 at 1500; 97 ER 947 at 948 cited by Dallas CJ in *Gilman v Elton* (1821) 3 Brod & B 75 at 80; 129 ER 1211 at 1212.

<sup>108</sup> Bankton, *Institute*, I.17.10.

<sup>109</sup> *Lyons v Elliot* (1876) 1 QBD 210 at 213.

<sup>110</sup> Cooper, *Landlord and Tenant* 183.

<sup>111</sup> See generally Law Commission, *Distress for Rent* (Working Paper No 97, 1986) paras 2.44-2.45; J Karas, ‘Distress’ in *Halsbury’s Laws of England* (4<sup>th</sup> edn) vol 13 (2007) paras 928-961; Rook, *Distress for Rent* 28-41.

<sup>112</sup> Law of Distress Amendment Act 1908 s 1.

<sup>113</sup> 1908 Act s 4(1).

<sup>114</sup> 1908 Act s 4A.

<sup>115</sup> For a style, see Rook, *Distress for Rent* 98-99.

nevertheless no obligation on the landlord to notify him that distress has been carried out.<sup>116</sup> Moreover, the distress can be completed within a period of seven days, by which time it is too late for the third party to challenge.<sup>117</sup> Unsurprisingly, concern has been expressed about the rights of the third party under these rules.<sup>118</sup> The new CRAR procedure for commercial tenants under the Tribunals, Courts and Enquiries Act 2007 will exclude such property.<sup>119</sup>

*b. Louisiana*

In Louisiana, the 1825 version of the Civil Code provided that the ‘pledge’ of the landlord in respect of the rent affected moveable property ‘belonging to third persons, when their goods are contained in the house or store, by their own consent, express or implied.’<sup>120</sup> This was construed narrowly by the courts.<sup>121</sup> In *Boone v Browne*<sup>122</sup> a trailer belonging to a third party was held to be unaffected because it was parked on a vacant lot leased to the tenant and was not in a house or store. The landlord’s right was weakened in the 1984 version of the Code. Rather than a right of pledge, the landlord was merely given a right to ‘lawfully seize movables belonging to a third person, when they are contained in the house or store by his own consent, express or implied’.<sup>123</sup> The owner was given the right to recover his property prior to the judicial sale. This right was not available under the 1825 version. If, however, the third party did not assert ownership, the goods could be sold as if they were the tenant’s.

A further amendment was made in 2004, the relevant provision, in force today, becoming:

‘The lessor may lawfully seize a movable that belongs to a third person if it is located in or upon the leased property, unless the lessor knows that the movable is not the property of the lessee.

The third person may recover the movable by establishing his ownership prior to the judicial sale in the manner provided by Article 1092 of the Code of Civil Procedure. If he fails to do so, the movable may be sold as though it belonged to the lessee.’<sup>124</sup>

This extends the third party effect by removing the requirement of situation in a house or store. It also replaces the need for the consent of the third party, with ignorance on the part of the landlord. Presumably, this means that stolen goods are covered now, provided that the landlord does not know of the theft.

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<sup>116</sup> Law Commission, Landlord and Tenant: Distress for Rent, para 3.9.

<sup>117</sup> Ibid at para 3.12.

<sup>118</sup> See, for example, Loveland, ‘Distress for Rent: An Archaic Remedy?’ at 368-369; D Rook, *Property Law and Human Rights* (2001) 184-186 and 190-191.

<sup>119</sup> See below, at D(5)(a).

<sup>120</sup> Art 2707 *Louisiana Civil Code* (1825).

<sup>121</sup> Palmer, *The Civil Law of Lease in Louisiana* § 6-4.

<sup>122</sup> 201 La 917, 10 So 2d 701 (1942).

<sup>123</sup> Art 2707 *Louisiana Civil Code* (1984).

<sup>124</sup> Art 2709 *Louisiana Civil Code* (2004).

c. *Scotland*

The principle that the third party has impliedly consented to the goods coming under the hypothec has been stated in modern Scottish cases.<sup>125</sup> If the third party has clearly not consented, then the goods will escape. The leading case is *Jaffray v Carrick*<sup>126</sup> where the tenant was retaining his sister's furniture against her wishes and she had raised proceedings for delivery of it. It was held not to be covered by the hypothec.

The Scottish case law as a whole is not entirely consistent and only a brief summary can be given here.<sup>127</sup> Articles hired by the tenant or lent to him or her gratuitously are subject to the hypothec, but they may be excluded if the tenant only has them briefly. An example of the latter would be seating hired for a dinner party.<sup>128</sup> This reflects earlier authority requiring permanency.<sup>129</sup> Things not possessed by the tenant, but by others, such as his children or lodgers are protected. For example, in *Bell v Andrews*<sup>130</sup> the landlord was unable to enforce his remedy against a piano given to the tenant's daughter (who was a child) by her grandmother. As regards business premises such as shops, goods which are on exhibition as samples of the manufacturer will not be covered.<sup>131</sup> But the ordinary plenishings will. This has been held to include in the case of a café, a hired jukebox, there, in the words of the judge to satisfy 'the public craving for noise as a background to normal life'.<sup>132</sup>

In a report published in 1964, the Law Reform Committee for Scotland recommended that the hypothec should be restricted to the tenant's goods.<sup>133</sup> It argued that 'it is manifestly wrong that a person should be allowed to do diligence against the goods of a person who is not his debtor'.<sup>134</sup> The background to the report was the concern that those providing tenants with goods under contracts of hire and hire purchase should not lose their property to the landlord.<sup>135</sup> It was, however, to be more than forty years before the law was changed, principally on human rights grounds.<sup>136</sup>

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<sup>125</sup> For example, *Dundee Corporation v Marr* 1971 SC 96 at 100 per Lord President Clyde; *Scottish and Newcastle Breweries Ltd v Edinburgh District Council* 1979 SLT (Notes) 11.

<sup>126</sup> (1836) 15 S 43.

<sup>127</sup> For more detail, see McAllister, *Scottish Law of Leases* paras 5.46-5.61 to which this account owes much.

<sup>128</sup> *Adam v Sutherland* (1863) 2 M 6 at 8 per Lord Deas.

<sup>129</sup> See above. But compare *Scottish and Newcastle Breweries Ltd v Edinburgh District Council* 1979 SLT (Notes) 11.

<sup>130</sup> (1885) 12 R 961.

<sup>131</sup> *Pulsometer Engineering Co Ltd v Gracie* (1887) 14 R 316.

<sup>132</sup> *Dundee Corporation v Marr* 1971 SC 96 at 101 per Lord President Clyde.

<sup>133</sup> See Lord Hope of Craighead, 'Do We Still Need a Scottish Law Commission?' (2006) 10 *Edin LR* 10 at 15.

<sup>134</sup> Fourteenth Report of the Law Reform Committee for Scotland (1964) para 16.

<sup>135</sup> Two of the committee, however, dissented, commenting: 'The competition between the landlord and the hire purchase company is in reality a competition between security holders and it is by no means clear that the equity is in favour of the hire purchase company'.

<sup>136</sup> See below, at D(5)(d).



d. South Africa

The requirements for third party property to be affected were set out in *Bloemfontein Municipality v Jacksons Ltd*<sup>137</sup> by Curlewis JA:

[1] When goods belonging to a third person are brought on to leased premises with the knowledge and consent, express or implied, of the owner of the goods, and [2] with the intention that they shall remain there indefinitely for the use of the tenant, and [3] the owner, being in a position to give notice of his ownership to the landlord fails to do so, and [4] the landlord is unaware that the goods do not belong to the tenant, [5] the owner will thereby be taken to have consented to the goods being subject to the landlord's tacit hypothec, and liable to attachment [for rent arrears].<sup>138</sup>

The numbering here is mine. Parts [1] and [5] proceed on the consent rationale, like Scotland. As can be seen, from [2] permanence is once again required. Moreover, like Scotland the must be there for the tenant's own use. A piano used solely by the tenant's daughter will once again escape.<sup>139</sup> In terms of [3], where the owner gives notice to the landlord, the hypothec cannot attach the property.<sup>140</sup> It has been doubted whether this is Scots law, on the basis that the landlord is entitled to look to the full plenishings of the premises to secure the rent.<sup>141</sup> This questions whether Sheriff Court decisions which are consistent with the South African position are correct.<sup>142</sup> The doubt is misplaced. The landlord who is notified that goods do not belong to the tenant can seek a plenishings order requiring the tenant to bring sufficient of his own goods to meet the rent.<sup>143</sup> Moreover, there is Court of Session authority supporting the view that notice to the landlord excludes the hypothec.<sup>144</sup> Part [4] requires the landlord to be unaware that the goods are not the tenant's. There does not appear to be authority to this effect in Scotland.<sup>145</sup> Finally, mention must be made of the Security by Means of Movable Property Act 1993 which excludes third party property which is the subject to a notarial bond<sup>146</sup> or an instalment agreement.<sup>147</sup> The latter would cover hire purchase and is interesting, because in both England and Scotland, such goods could be attached by the landlord.<sup>148</sup>

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<sup>137</sup> 1929 AD 266 at 271.

<sup>138</sup> For discussion, see T J Scott and S Scott, *Willes's Mortgage and Pledge* (3<sup>rd</sup> edn, 1987) 101-104; Badehorst, Pienaar and Mostert, *Silberberg and Schoeman's Law of Property* 405-407 and 436-439; Cooper, *Landlord and Tenant* 183-191.

<sup>139</sup> *Langlands v Francken* 1881 Kotzé 256.

<sup>140</sup> See, for example, *Eight Kaya Sands v Valley Irrigation Equipment* 2003 (2) SA 495 (T).

<sup>141</sup> Rankine, *Law of Leases* 375.

<sup>142</sup> *Orr v Jay & Co* (1910) 27 Sh Ct Rep 159; *Wood & Co v Wishart* (1904) 21 Sh Ct Rep 128.

<sup>143</sup> On plenishings orders, see McAllister, *Scottish Law of Leases* para 5.69.

<sup>144</sup> *Jaffray v Carrick* (1836) 15 S 43 at 45 per Lord Moncreiff; *Dundee Corporation v Marr* 1971 SC 96 at 101 per Lord President Clyde. Both cite Voet, *Commentarius ad Pandectas* 20.2.5 and Pothier, *Contrat de Louage* § 241.

<sup>145</sup> Italian law takes a similar position to South African law. See art 2764 *Codice Civile*.

<sup>146</sup> Except if the property is in the possession of the mortgagee, which presumably is where the tenant is the creditor.

<sup>147</sup> Security by Means of Movable Property Act 1993, s 2(1).

<sup>148</sup> On England, see above. For Scotland, see *Rudman v Jay* 1908 SC 552 and *Caldwell v Drake* (1915) 31 Sh Ct Rep 298.

#### 4. Critique

As can be seen, third party effect has continued in a number systems until modern times.<sup>149</sup> Can it be justified today by any of the rationales set out above? We can begin by discounting ground (d), that distress originally did not give a right to sell. In modern law it does and it clearly will affect a third party adversely if his or her goods are sold to cover the tenant's rent arrears. The risk of prejudice was recognised by Blackburn J who formulated the rationale here.<sup>150</sup>

We can also dismiss rationale (e) – personal bar. As Reid and Blackie have shown, this requires inconsistency on the part of the person who is barred.<sup>151</sup> For example, Alan stands by and watches his neighbour Barbara erect a conservatory. He then seeks to enforce a real burden preventing Barbara building. This is not the case as regards a third party owner of goods subjected to the landlord's hypothec. All he or she does is give the tenant possession of them. This is no more personal bar than the seller who could give the buyer possession but not immediate ownership in a contract of sale and enables him or her to confer a good title on a third party under the Sale of Goods Act 1979 section 25.<sup>152</sup> Moreover, the landlord will not normally know about the third party goods until enforcement, so cannot be said to have relied on some previous representation that the goods were the tenant's.<sup>153</sup>

Rationale (c) is the avoidance of fraud. The landlord should not be exposed to the risk of the tenant pretending that the goods belong to a third party and are thus exempt. Of course there would be such a risk. There is, however, always the possibility of debtors trying to defeat their creditors in this manner. This cannot be adequate justification for giving the landlord's hypothec an advantage which other creditors do not have and allow the ownership right of the third party to be trumped.

Equally doubtful is rationale (b), that the landlord does not know whether the tenant is solvent. This risk affects other creditors too. Again, there is no justifiable reason for giving landlords a greater right. There are other ways for a prospective landlord to deal with it, for example requiring a rent deposit or a guarantee from a third party.<sup>154</sup> These do not prejudice the property rights of third parties.

Finally, there is rationale (a), that the third party has impliedly consented to the application of the hypothec to his property. While this is the most heavily cited justification, it is a weak one. As one South African judge has commented:

This . . . appears to be a strange approach because I find the greatest difficulty in believing any owner, if asked the question, would agree to his goods being made

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<sup>149</sup> In addition to the systems already mentioned, this is also the position in France under art 2232 *Code civil* and Italy under art 2764 *Codice Civile*. But third party goods are exempt under German law. See § 562 BGB and D Ehlert, '§ 562 para 15' in *Beck'scher Online-Kommentar* (H G Bamberger & H Roth eds; 6th edn, 2007).

<sup>150</sup> *Lyons v Elliott* (1876) 1 QBD 210 at 213-214.

<sup>151</sup> E C Reid and J W G Blackie, *Personal Bar* (2006) paras 2-01-2-39.

<sup>152</sup> *Ibid* at para 11-25.

<sup>153</sup> See J S McLennan, 'A Lessor's Hypothec over the Goods of Third Parties – Anomaly and Anachronism' (2004) 16 *SA Merc LJ* 121 at 123.

<sup>154</sup> See for example M J Ross and D J McKichan, *Drafting and Negotiating Commercial Leases in Scotland* (2<sup>nd</sup> edn, 1993) paras 5.5-5.16.

subject to such hypothec. He would almost invariably reply: “Of course I do not agree to it; why should I?”<sup>155</sup>

Similarly, in Scotland, the reasoning that the third party agrees to take the risk of hypothec has been judicially criticised as ‘not . . . very satisfactory’.<sup>156</sup> In reality, the implied consent is a fiction whereby the owner is taken to have accepted this rule of law.<sup>157</sup> An alternative theory that the consent is inferred from the owner being negligent or indifferent in asserting his ownership rights can be dismissed.<sup>158</sup> If the implied consent theory is merely a fiction, without any clear policy justification, it is very difficult to defend.

## **5. Human rights**

Third party effect is also vulnerable to a human rights or constitutional challenge. The European Convention on Human Rights article 1 protocol 1 guards against the deprivation of property rights. There are similar provisions in many written constitutions.<sup>159</sup> The position in a number of jurisdictions will now be discussed.

### *a. England*

Distress for rent has been argued to contravene not only article 1 protocol 1, but also article 6 (the right to a fair hearing) and article 8 (the right to a private life) of the ECHR.<sup>160</sup> These concerns seem to have been accepted by the Government. In its 2001 Consultation paper, which provides the basis for the Tribunals Courts and Enforcement Act 2007, it makes it clear that the new recovery procedure will not cover third party goods. These will be on the list of goods which are exempt.<sup>161</sup>

### *b. Ireland*

The Irish Constitution has a number of clauses protecting the property rights of citizens.<sup>162</sup> It was suggested as long ago as 1968 that the law of distress in its application to third party goods may be unconstitutional.<sup>163</sup> The leading modern text takes the same view.<sup>164</sup> The reason why there has not been a challenge is probably because it is rarely used, due to a number of practical and procedural difficulties.<sup>165</sup>

### *c. Louisiana*

In 1982 there was an unsuccessful constitutional challenge to the application of the lessor’s privilege to third party goods.<sup>166</sup> The arguments were that seizure of such goods amounted to an unconstitutional removal of private property for public use without proper compensation

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<sup>155</sup> *TR Services (Pty) Ltd v Poynton’s Corner Ltd* 1961 (1) SA 773 (D) at 775 *per* Warner J.

<sup>156</sup> *Bell v Andrews* (1885) 12 R 962 at 964 *per* Lord Shand.

<sup>157</sup> Rankine, *Law of Leases* 375.

<sup>158</sup> McLennan, ‘A Lessor’s Hypothec over the Goods of Third Parties – Anomaly and Anachronism’ at 122.

<sup>159</sup> A J van der Walt, *Constitutional Property Clauses: A Comparative Analysis* (1999).

<sup>160</sup> Rook, *Property Law and Human Rights* 183-191.

<sup>161</sup> Lord Chancellor’s Department, *Enforcement Review Consultation Paper 5: Distress for Rent* (2001) chapter 3 paras 37 and 38.

<sup>162</sup> Articles 40.3.1, 40.3.2, 43.1.2 and 43.2.2, Constitution of Ireland.

<sup>163</sup> K Deale, *The Law of Landlord and Tenant in the Republic of Ireland* (1968) 142-143.

<sup>164</sup> J C Wylie, *Landlord and Tenant Law* (2<sup>nd</sup> edn, 1998) paras 12-14 and 12-15.

<sup>165</sup> *Ibid.*

<sup>166</sup> *RCA Global Communications Inc v Executive Office Towers*, Civil Action No 79-3712 (E D La 1981) (unpublished opinion).

and that requiring on person to pay the debts of another person contravened notions of substantive due process.<sup>167</sup> The challenge failed. It has not been possible to obtain a copy of the unreported judgment, so the court's reasoning cannot be discussed. Be that as it may, the version of the Code in force from 1984 allowing the third party to claim his or her goods prior to the judicial sale and the amendment made in 2004 requiring the landlord to be unaware of the true position prior to selling may also help the rule constitutionally. Nevertheless, there is still scope for argument on the issue.

*d. Scotland*

In an article published in 2002 I suggested that the third party effect of the hypothec breached article 1 protocol 1 of the ECHR.<sup>168</sup> The common law offers very limited protection of the proprietary rights of the third party, effectively only the right to insist that the tenant's goods are sold first. The argument seems to have been accepted by the Scottish Executive. It stated in the Policy Memorandum to the Bankruptcy and Diligence etc (Scotland) Bill that: '[It] is wrong in principle that a third party should lose property in order to pay debts due to a third party. Indeed, it is thought that this may breach the right to enjoy property under Article 1 of Protocol 1 to the ECHR. This is indeed the main reason why the Executive has decided to reform the security of the hypothec at this time.'<sup>169</sup> The relevant provision in the Bill was duly passed by the Scottish Parliament, but has yet to come into force.<sup>170</sup>

*e. South Africa*

There does not appear to have been a challenge yet to the third party effect of the lessor's hypothec under the South African constitution.<sup>171</sup> Other aspects of security law have been challenged.<sup>172</sup> Perhaps the most relevant case is *First National Bank of SA Ltd t/a Wesbank v Commissioner for the South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance*.<sup>173</sup> This involved a challenge to a statutory provision giving the Commissioner a lien over and the right to sell goods to recover customs debts. It covered any goods in the possession of the debtor, including those belonging to a third party. The Constitutional Court struck down the provision as regards third party goods declaring that there was no sufficient reason for them to be affected. The same logic surely applies to the lessor's hypothec. The standard procedure in South Africa, however, is that owners of moveables kept by lessees give notice to the owner of the leased premises of their ownership, and thereby protect their moveables against the hypothec. This may explain the absence of a challenge to date.

*f. Assessment*

The lesson to draw from Scotland and England is that if the natural injustice of third party coverage is insufficient to spur legislative reform, then the threat of a human rights challenge is. Human rights law, which has often been the subject of criticism, has played a valuable role here.

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<sup>167</sup> Palmer, *The Civil Law of Lease in Louisiana* § 6-4.

<sup>168</sup> Steven, 'Goodbye to the Landlord's Hypothec?' at 178-179.

<sup>169</sup> Policy Memorandum to the Bankruptcy and Diligence etc (Scotland) Bill para 1010.

<sup>170</sup> Bankruptcy and Diligence etc (Scotland) Act 2007 s 208(4).

<sup>171</sup> The property protection clause is section 25 of the 1996 Constitution.

<sup>172</sup> For example, in *Chief Lesapo v North West Agricultural Bank* 2000 (1) SA 409 (CC).

<sup>173</sup> 2002 (4) SA 768 (CC),

## **E. Should the Landlord Be Preferred?**

The previous sections of this article have shown that the edifice of his landlord's hypothec being slowly but surely chipped away. A number of systems, such as the Netherlands, Northern Ireland and Quebec have entirely abolished the remedy. Others, such as Scotland, England and the Republic of Ireland have excluded its operation from residential properties. Third party effect has been watered down, for example, by Louisiana, or entirely removed as in England and Scotland. This begs the question whether the landlord deserves any sort of priority.

From a Scottish perspective recent times have seen the abolition of various preferences. The Debtors (Scotland) Act 1987 removed the preference of local authorities over the goods of the debtor for unpaid rates.<sup>174</sup> The Enterprise Act 2002 abolished the Crown (state) preference for taxes when a company is insolvent.<sup>175</sup> When framing the Bill which is now the Bankruptcy and Diligence etc (Scotland) Act 2007, the Executive, noting that it had not consulted on the reform of the landlord's hypothec,<sup>176</sup> commented: 'Complete reform or indeed complete abolition concerns the law of security over moveable property, and should be dealt with at another time'.<sup>177</sup> This is an entirely reasonable position.<sup>178</sup> But it did not stop the Executive from abolishing the hypothec as regards residential and agricultural leases, as mentioned above, without consultation. Commercial leases seem to have been left alone simply for the reason that the hypothec is used there.<sup>179</sup>

In contrast, the Government in England did specifically consult on the Law Commission's proposal to abolish distress. It noted that a high majority of the Commission's own respondents favoured retention for commercial properties, but an 'overwhelming' number of these were landlords.<sup>180</sup> The remedy is used widely in that sector. At least 20,000 cases were commenced in the year to September 2000, but in less than 2% were goods actually seized and sold.<sup>181</sup> The Government commented that removal of the procedure would mean that landlords would have to resort to recovering arrears through the courts. This would be more costly.<sup>182</sup> It would mean that the landlords in marginal premises such as railway arches would have to resort to vetting procedures and requiring significant rent deposits.<sup>183</sup> A court based remedy would take longer, allowing more arrears to accumulate and allowing the tenant time to remove goods.<sup>184</sup>

The Government's view was that a modified non-court based procedure was preferable. It was aware that this treated landlords different from other creditors, but this was 'justifiable because landlords are in a different position from other trade creditors, who can withhold the supply of goods or services if bills are not paid. Landlords cannot easily remove the use of the

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<sup>174</sup> Debtors (Scotland) Act 1987 s 74(4). See R Macpherson, 'Are Preferences Preferable?' 2002 *SLT (News)* 257. 'Rates' were then form of local taxation.

<sup>175</sup> Enterprise Act 2002 s 251.

<sup>176</sup> It has only consulted on the abolition of the special enforcement procedure, sequestration for rent.

<sup>177</sup> Policy Memorandum to the Bankruptcy and Diligence etc (Scotland) Bill para 1010.

<sup>178</sup> Indeed, I have advocated it elsewhere. See Steven, 'Goodbye to the Landlord's Hypothec?' at 179-180.

<sup>179</sup> Some landlord, however, hesitate to use it because by doing so they may become liable for the unpaid taxes of the tenant. See A J M Steven, 'Goodbye to Sequestration for Rent' 2006 *SLT (News)* 17.

<sup>180</sup> Enforcement Review Consultation Paper 5: Distress for Rent sv 'The Law Commission Report'.

<sup>181</sup> Ibid at chapter 2, para 8.

<sup>182</sup> Ibid at chapter 2, paras 9-10.

<sup>183</sup> Ibid at chapter 2, para 11.

<sup>184</sup> Ibid at chapter 2, para 14.



property and further arrears of rent may accrue.’<sup>185</sup> The modified procedure, as mentioned earlier, will be called CRAR (commercial rent arrears recovery) and is being introduced under the Tribunal, Courts and Inquiries Act 2007.

The Government’s arguments are not very convincing. They are pro commercial landlords, many of whom are large institutional investors. If other creditors require to incur costs by having to go to court, it is difficult to see why landlords should not have to do the same. If court procedures are slow, Government resources can be used to speed them up. Whether other creditors can withhold goods or services will much depend on their bargaining position. As has been pointed out before, there are other ways of landlords protecting themselves, such as by requiring third party guarantees, or indeed the rent deposits or vetting procedures which the Government mention. A further possibility is taking real security from the tenant. This is what often happens in Quebec now since the abolition of the lessor’s privilege.<sup>186</sup> CRAR is therefore seemingly an example of what Lord Brougham mentioned in his judgment referred to at the start of this article – ‘the landlords having made the laws’.

Should then the landlord be preferred? Given the total or partial abolition in so many jurisdictions and the reasons for this, it is very tempting to conclude that he or she should not. The proper approach, however, is to consider the position in the context of other tacit securities and preferences.<sup>187</sup> This would be best done carefully by the appropriate national law reform body, such as the Scottish Law Commission. It is the way forward which is to be recommended.

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<sup>185</sup> Ibid at chapter 2, para 15.

<sup>186</sup> Carsley, ‘Commercial Leasing under the New Civil Code of Quebec’ at 25. In Scotland, the only viable security that could be used would be the floating charge as it is non possessory. The option of taking real security would be therefore confined principally to where the tenant is a company or LLP.

<sup>187</sup> See Steven, ‘Goodbye to the Landlord’s Hypothec?’ at 179-180.